No. 138, Original

IN THE

Supreme Court of the United States

STATE OF SOUTH CAROLINA,

Plaintiff,

v.

STATE OF NORTH CAROLINA,

Defendant.

CATAWBA RIVER WATER SUPPLY PROJECT;
CITY OF CHARLOTTE, N.C.; AND
DUKE ENERGY CAROLINAS, LLC,

Intervenors.

On Motion for Leave to File Exceptions to the First Interim Report of the Special Master

INTERVENORS' RESPONSE TO THE MOTION OF THE STATE OF SOUTH CAROLINA FOR LEAVE TO FILE EXCEPTIONS TO THE FIRST INTERIM REPORT OF THE SPECIAL MASTER

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INTERVENORS' RESPONSE TO THE MOTION OF THE STATE OF SOUTH CAROLINA FOR LEAVE TO FILE EXCEPTIONS TO THE FIRST INTERIM REPORT OF THE SPECIAL MASTER

South Carolina has asked this Court for immediate, interlocutory review of the Special Master's interim report, granting the motions to intervene of Duke Energy Carolinas, LLC ("Duke"), Catawba River Water Supply Project ("CRWSP"), and City of Charlotte, North Carolina ("Charlotte") (collectively hereafter, "Intervenors") and, subsequently, declining to reconsider that decision. South Carolina has also sought reversal of those decisions. Pursuant to direction provided by the Clerk's Office on December 11, 2008, this Response addresses only South Carolina's arguments in support of leave to file exceptions to the First Interim Report. If the Court requests a response to South Carolina's arguments regarding the merits of the First Interim Report, the Intervenors will promptly respond.

INTRODUCTION

South Carolina instituted this original action against North Carolina seeking an equitable-apportionment of the Catawba River, which flows from North Carolina into South Carolina. The River contains 11 impoundments and 13 hydroelectric facilities, all operated, managed and controlled by Duke, pursuant to a hydroelectric license issued by the Federal Energy Regulatory Commission, which authorizes Duke to "effectively control" the flow in the River. First Interim Report at 28. South Carolina alleges that reduced flows of the Catawba

River are exacerbated by inter-basin transfers of certain named North Carolina public entities pursuant to applicable law. The entities identified by South Carolina are intervenor Charlotte, Union County, North Carolina (one of two co-venturers that formed intervenor CRWSP, an interstate wholesale water provider), and the cities of Concord and Kannapolis, North Carolina.

The Complaint includes factual allegations about Duke's use of the Catawba River through its hydroelectric power generation facilities located in both North and South Carolina. *See, e.g.*, Complaint at ¶¶ 2 and 14. The Complaint identifies the inter-basin transfer of Charlotte and the inter-basin transfer of Union County, North Carolina, initiated by CRWSP from an intake located in South Carolina. *See id.* at ¶¶ 20(a) and 21. According to the Complaint, these transfers reduce the amount of water available to South Carolina, aggravate the existing natural conditions and droughts, and exceed North Carolina's equitable share of the Catawba River. *See id.* at ¶ 24. Except for the cities of Concord and Kannapolis, North Carolina (which do not seek to intervene in this action) and the Intervenors, the Complaint does not contain any specific averments against any other potential water withdrawer or user.

In the First Interim Report dated November 25, 2008 ("First Interim Report"), the Special Master recommended that the Court grant the motions to intervene of the three non-state entities specifically targeted by South Carolina in its Complaint – Duke,

Charlotte and CRWSP. None of the Intervenors asserts any claim for relief against South Carolina.[1]

The Special Master recognized that CRWSP "'is the authorized agent for the execution of the sovereign policy which threaten[s] injury to the citizens of [South Carolina].'" First Interim Report at 26-27 (quoting *New Jersey v. New York*). Accordingly, the Special Master correctly concluded that CRWSP should be allowed to appear separately in order to defend its transfer, which is the subject of South Carolina's claim for relief." *Id.* at 27-28. As an interstate entity, CRWSP is not adequately represented by South Carolina, given South Carolina's unabashed targeting of CRWSP's transfer of water to one of its owners, Union County, North Carolina. Of equal importance is the fact that North Carolina will not champion any increase in flow into South Carolina, which would be of benefit to CRWSP and its owners, including Union County, North Carolina.

The Special Master also correctly recognized that "Charlotte is the entity in North Carolina vested with authority to carry out the large majority of the inter-basin transfers of which South Carolina complains." *Id.* at 21. Charlotte is the only entity in North Carolina currently executing a substantial inter-basin transfer of water from the North Carolina portion of the Catawba River pursuant to a Certificate issued by North Carolina, and thus the

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[1] Pleadings, transcripts, orders, and other case related documents filed by or with the Special Master are available at http://www.mto.com/sm.

only entity whose current actions in the North Carolina portion of the River have been alleged by South Carolina to be a source of harm to that State's interests. The Special Master accurately noted that Charlotte "is the 'authorized agent' of a large part of South Carolina's claimed injury." *Id.* at 22. Accordingly, the Special Master concluded that "[e]ven though Charlotte has not been named by South Carolina as a defendant, for practical purposes non-incidental relief is sought against it," and it should have the opportunity to intervene for purposes of protecting its interests. *Id.* at 22-25.

Turning to Duke, the Special Master noted that Duke "is positioned differently from Charlotte and CRWSP." *Id.* at 28. Duke "effectively control[s] the flow of the Catawba through the impounding of water in reservoirs and the release of that impounded water." *Ibid.* The Special Master recognized that Duke "has several strong and independent interests that could affect, or be affected by, the outcome of this proceeding." *Ibid.* Specifically, the interim report acknowledged that Duke's control over the Catawba's flow, as well as "the terms of its existing and prospective [FERC] licenses," *id.* at 29, and its interest in the Comprehensive Relicensing Agreement and the process that led to that Agreement, could all be directly impacted by the outcome of this litigation. *Id.* at 32.

In her well-reasoned and detailed ruling, the Special Master correctly concluded that this Court's precedents provide a workable and appropriate standard for deciding motions to intervene by non-state entities in original jurisdiction matters, including equitable-apportionment cases. *Id.* at 12-

21. The Special Master also correctly determined that each of the Intervenors is entitled to join in this action, either because of a property interest in the River, or because of an interest or interests in the River sufficiently distinct, direct, compelling, and concrete to satisfy the standard applied by this Court in previous original actions. *Id.* at 25 (Charlotte); *id.* at 28 (CRWSP); *id.* at 32 (Duke). In addition to recommending that the Intervenors be permitted to intervene, the First Interim Report also denies South Carolina's motion seeking clarification or reconsideration of the recommended ruling on intervention. *Id.* at 32-35 (denying motion for clarification) and 36-42 (denying motion for reconsideration).

On December 9, 2008, South Carolina filed a motion for leave to file exceptions to the First Interim Report. South Carolina's principal assertions in support of its motion are: (1) the Special Master's ruling will significantly increase the costs of litigation to South Carolina and protract the resolution of this action if not reviewed at this time; (2) the appropriate standard for intervention in equitable-apportionment cases under the Court's original jurisdiction is unsettled and warrants immediate review; and (3) the Special Master's ruling will "open the floodgates for numerous non-state entities" to seek leave to intervene in other matters arising under the Court's original jurisdiction. As discussed below, all of these arguments lack merit. South Carolina's motion should be denied; and instead, the Court should consider any exceptions simultaneously, including those to intervention,

when the Court reviews the Final Report of the Special Master.

ARGUMENT

I. THE COURT SHOULD DECLINE TO ENTERTAIN EXCEPTIONS TO THE FIRST INTERIM REPORT

A. The Intervenors' Party Status Will Neither Prejudice South Carolina Nor Delay The Resolution Of This Action

South Carolina claims that the First Interim Report should be reviewed now because intervention by three non-state entities in this action will impose a "substantial and immediate burden on South Carolina without appropriate legal or factual justification." Mot. for Leave to File Exceptions to First Interim Report at 7. To bolster this argument, South Carolina relies on the *Guide for Special Masters in Original Cases Before the Supreme Court of the United States* as "specifically identifying motions to intervene as falling into a special category of motions" that reflect the Court's interest in reviewing such motions. *Ibid.* Neither the claim of prejudice nor the contention that this Court generally conducts interlocutory review of intervention orders withstands examination.

First, because the Intervenors are not injecting into this original jurisdiction action any claim or issue not already before the Court, their participation does not expand the scope of the equitable-apportionment claim, and thus does not substantively prejudice South Carolina. This Court

has made clear that a non-state party may intervene in an original action where, as here, that non-state party does not seek to expand the scope of the issues raised by the state parties. *See* Robert L. Stern et al., Supreme Court Practice 554 (8th ed. 2002) ("provided at least one state is on each side of the controversy, the presence of nonstate parties, even indispensable parties, does not affect the exclusive jurisdiction of the Supreme Court."). Thus, contrary to the suggestions by South Carolina, *see* Mot. for Leave to File Exceptions to First Interim Report at 8, the Court's refusal to consider exceptions to the First Interim Report at this time and allow the continued participation of the Intervenors in this litigation does not result in any material prejudice to South Carolina's interests.

Indeed, thus far, South Carolina has benefited by the Intervenors' party status. For example, South Carolina has served discovery directly on the Intervenors without the added expense, delay, and complexity of conducting third-party discovery.[2] At least some of that discovery, *e.g.*, interrogatories, is only available to South Carolina so long as the Intervenors remain parties. In addition, South Carolina's discovery efforts are extensive, ongoing, and simply mirror in scope or content the averments

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[2] While it is true that each of the Intervenors has its own legal counsel, that does not burden South Carolina and would be the case if South Carolina were pursuing third-party discovery from the Intervenors. For example, at least some of the recipients of third-party subpoenas already served by South Carolina had their own legal counsel.

in the Complaint lodged against the Intervenors that resulted in the motions to intervene.

The related assertion by South Carolina that "catch up" discovery will unduly delay the deposition and trial phases of this case is also unfounded. If this Court declines to hear exceptions now, Intervenors can participate fully in discovery and there will be no need for a catch-up period. Case Management Order 7 ("CMO 7"), which was entered by the Special Master on September 18, 2008, expressly states that the discovery procedures set forth in the order will govern discovery by and from the Intervenors "pending the Special Master's issuance of an Interim Report regarding the issue of intervention and any proceedings in the Court with respect to such Interim Report." CMO 7 at ¶ 2. Hence, a refusal by this Court to entertain exceptions to the First Interim Report will lift those restrictions and factual development of this case will proceed in a timely and typical manner. Discovery in the case currently is not proceeding in a timely and typical manner because of South Carolina's request for an interim report on the intervention decision and its pursuit of immediate review thereof.

Until the intervention issue is resolved, however, CMO 7 imposes restrictions on the Intervenors' ability to participate in discovery. If the Court considers exceptions to the First Interim Report, those restrictions will remain in place until the Court issues its decision thereby delaying, rather than expediting, the factual development and disposition of this case.

Second, South Carolina argues that it will be burdened by increased litigation costs if the

Intervenors are permitted to participate in this action. Mot. for Leave to File Exceptions to First Interim Report at 8. In actuality, however, the participation of the Intervenors is the inevitable and direct result of the allegations of South Carolina's complaint which is specifically focused on the Intervenors. The "cost concern" is embodied within and addressed by the standard governing intervention. Implicit in the recommendation to allow intervention in this case (or any other case) is that the cost concerns of the named parties must yield to the substantive interests of the proposed intervenors. Litigation costs (and the risk that they will increase substantially) are implicated by every interlocutory order. Because most interlocutory orders, including decisions granting intervention, can be effectively reviewed at the conclusion of litigation, this Court and the lower federal courts hold that immediate review of an interlocutory order granting intervention is not warranted regardless of alleged cost concerns. *See J.B. Stringfellow, infra.*

South Carolina also asserts that the parties will be burdened in the form of increased costs and expenses of the Special Master if intervention is permitted. Mot. for Leave to File Exceptions to First Interim Report at 8 n.5. This contention is without basis. Intervention does not change the averments in the Complaint or the breadth of discovery that South Carolina may pursue regardless of intervention. The Intervenors have no interest in making this litigation more protracted or costly than it otherwise would be, and the Special Master has the tools necessary to prevent any cumulative or unnecessary proceedings and costs. In addition, though South Carolina seeks

to attribute the majority of intervention-related costs to the Intervenors' actions, the reality is that the Intervenors only filed their respective motions to intervene. Since then, South Carolina has filed a motion for clarification or, in the alternative, reconsideration (which was briefed and argued to the Special Master), a motion seeking the issuance of an interim report (which was briefed and argued to the Special Master), and this motion for leave to file exceptions to the First Interim Report. Further, the prospect of three more parties bearing some share of the cost of the Special Master is highly unlikely to increase South Carolina's proportionate share. The suggestion by South Carolina that the Intervenors are the source and cause of "substantial" additional intervention-related costs is fiction.

As part of its cost argument, South Carolina argues that it should be permitted to seek immediate review of the order granting intervention because it is a State and its litigation costs "will be borne out of public funds." Mot. for Leave to File Exceptions to First Interim Report at 9. This claim is without merit. First, the cases discussing the standard for allowing intervention in original actions and the cases limiting the right to seek immediate review of decisions granting intervention do not draw distinctions between public and private entities. Second, although overlooked by South Carolina, even if the status of the parties was relevant to the intervention decision (which it is not), CRWSP is a joint venture of two *public* entities (Lancaster County Water and Sewer District, South Carolina and Union County, North Carolina), Charlotte is a *public* entity, and North Carolina is a *public* entity. The cost and

burden concerns voiced by South Carolina, *see* Mot. for Leave to File Exceptions to First Interim Report at 9 n.6, are further dispelled by the practical reality that whether the Intervenors participate as parties or as third-parties and/or amici, their legal arguments will be the same and South Carolina will be required to address them. Similarly, whether or not the Intervenors remain in the case as parties, South Carolina will continue to incur the costs of seeking discovery from the Intervenors on the issues framed by the pleadings. Indeed, the Intervenors' participation in this case as parties benefits South Carolina in that it will be able to avoid the expense, delay, and limits of third-party discovery, and expand the discovery devices available (*e.g.*, interrogatories) so long as the Intervenors remain in the case.

Third, Rule 17.2 of the Rules of the Supreme Court of the United States notes that in cases arising under the Court's original jurisdiction, the Federal Rules of Civil Procedure "may be taken as guides." *See* Rule 17.2. Rule 24 of the Federal Rules of Civil Procedure governs intervention. Thus, contrary to South Carolina's contention otherwise, *see* Mot. for Leave to File Exceptions to First Interim Report at 9 n.6, cases applying that rule are relevant to this motion. This Court and lower federal courts applying Rule 24 of the Federal Rules of Civil Procedure uniformly hold that orders granting intervention are *not* subject to immediate appeal because they can be effectively reviewed on appeal from a final judgment or, as applicable in this case, Final Report. *See, e.g.*, *J.B. Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 378 (1987); *SEC v. Chestman*, 861 F.2d 49, 50 (2d Cir. 1988) (*per curiam*); *see generally* 15B

Wright & Miller, Federal Practice and Procedure § 3914.8.

Fourth, the *Guide for Special Masters in Original Cases Before the Supreme Court of the United States* (which has no authoritative weight) does not characterize interim reports on motions to intervene as falling into a "special category" or, as claimed by South Carolina, reflect the "typical practice" or "usual practice" of the Court regarding whether to entertain exceptions to an interim report. Instead, the *Guide* simply uses an interim report on a motion to intervene in *Alaska v. United States*, No. 128 Original, as an example of a case in which an interim report was filed. There are many counter-examples of cases in which the Court did not address the Special Master's ruling on intervention until the final report – or, at least, until a report that contained additional recommendations on the merits. *See Nebraska v. Wyoming*, 507 U.S. 584, 589 (1993) (report resolved summary judgment as well as intervention); *South Carolina v. Baker*, 485 U.S. 505, 510-11 (1988) (final report addressed both intervention and merits); *Arizona v. California*, 460 U.S. 605, 612-13 (1983) (noting that the Court had earlier refused to allow exceptions to the special master's intervention decision, *see* 444 U.S. 1009, and considering the propriety of intervention along with other issues in the master's final report).

Finally, neither of the cases cited in the *Guide* – *Alaska v. United States*, No. 128 Original, and *New Jersey v. New York*, No. 120 Original – actually supports South Carolina's request for leave to file exceptions. In both cases, the Court simply ordered the Special Master's report filed and entered a ruling

on the motion to intervene without considering exceptions. *See Alaska v. United States*, 534 U.S. 1103 (2002) (ordering report of Special Master filed and entering ruling on motion to intervene); *New Jersey v. New York*, 514 U.S. 1125 (1995) (same). Thus, the *Guide* contradicts, rather than supports, South Carolina's assertion that it is the "usual" or "typical" or "ordinary" practice of the Court to entertain exceptions to an interim report on intervention.

B. It Is Well-Established That Intervention In Original Actions Is Appropriate Under Certain Circumstances And The Recommendation Of The Special Master Does Not Risk Encouraging Non-State Entities To Seek To Intervene In Original Actions

In support of its request to file exceptions, South Carolina contends that the standard for intervention in equitable-apportionment actions within this Court's original jurisdiction is unsettled. Mot. for Leave to File Exceptions to First Interim Report at 3. The Court, however, has faced the issue of intervention in original actions by non-state entities previously, and there is no reason to treat original equitable-apportionment actions differently from other original actions.

This Court consistently holds that it is appropriate on occasion to allow non-state parties to intervene and participate in original actions. *See, e.g., Maryland v. Louisiana*, 451 U.S. 725 (1981); *Texas v. Louisiana*, 426 U.S. 465 (1976); *Utah v. United States*, 394 U.S. 89 (1969). This makes sense

given that the Court has allowed municipalities and other entities to participate as defendants in original actions where their interests are directly challenged, such as where the complaining state challenges a diversion of water to that municipality. The Court has permitted this even where the state in which the municipality was located was a party to the action and had interests aligned with those of the municipality. *See, e.g., New Jersey v. New York*, 345 U.S. 369 (1953); *Missouri v. Illinois*, 180 U.S. 208 (1901); *Kansas v. Colorado*, 206 U.S. 46 (1907).

South Carolina's contention that the Court (or Special Master) risks being inundated with intervention motions in equitable-apportionment cases brought under the Court's original jurisdiction is unfounded. South Carolina identifies only one equitable-apportionment case now pending, and that case does not implicate a motion to intervene. *See* Mot. for Leave to File Exceptions to First Interim Report at 9-10.[3] In any event, it strains credulity to conclude that an immediate review of the Special Master's intervention decision in this case will be determinative of whether any motions to intervene are pursued or the outcome of such motions in any other cases.

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[3] South Carolina points to a second case, *Georgia v. Florida*, in which intervenors seek certiorari review of a Court of Appeals for the D.C. Circuit decision having nothing whatsoever to do with this Court's original jurisdiction, interstate water disputes, or equitable-apportionment. That case deals instead with the application of a federal statute to the U.S. Army Corps of Engineers' operation of a federal reservoir.

CONCLUSION

For the foregoing reasons, South Carolina's motion for leave to file exceptions to the First Interim Report should be denied.

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December 18, 2008